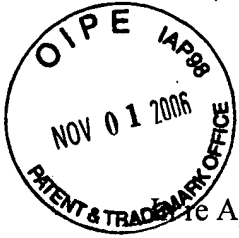


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**UNITED STATES PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS AND INTERFERENCES**

Application of

M. DeRaud and A. Gambel

Application No. 09/954,491

Filing Date: September 11, 2001

For: **A METHOD OF CONFIGURING
A SLICE OF PIZZA-TYPE PIE
AND AN APPARATUS FOR
PREPARING A PIZZA-TYPE
PIE**

) Group Art Unit: 1761

) Examiner: Tran Lien, Thuy

) **SUPPLEMENTAL APPEAL BRIEF**

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

CERTIFICATE OF MAILING

I hereby certify that the correspondence enclosed herein is being deposited with the United States Postal Service on this date October 30, 2006, addressed to: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

By: _____

TERI NELMARK

Sir:

In response to the Notification of Non-Compliant Appeal Brief dated October 23, 2006, Applicant hereby amends the Appeal Brief filed on October 12, 2006, and submits this timely Supplemental Appeal Brief on the above-referenced patent application. This Supplemental Appeal Brief now contains a clean copy of the claims at issue, as well as a marked-up copy of the claims, in the Claims Appendix beginning on page 23. This Supplemental Appeal Brief and the previous Appeal Brief respond to the Primary Examiner's final office action dated February 8, 2006.

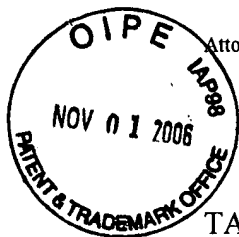


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REAL PARTY IN INTEREST

The sole real parties in interest regarding the present application and its appeal are the owners and named inventors for the above-referenced application, Mark DeRaud and Adam Gambel (Appellants and Applicants).

RELATED APPEALS AND INTERFERENCES

To the best of Appellants' knowledge, there are no appeals or interferences that will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

The following represents the status of all claims in the proceeding:

1. (rejected and currently appealed)
2. (rejected and currently appealed)
3. (rejected and currently appealed)
4. (rejected and currently appealed)
5. (rejected and currently appealed)
6. (rejected and currently appealed)
7. (rejected and currently appealed)
8. (rejected and currently appealed)
9. (rejected and currently appealed)
10. (rejected and currently appealed)
11. (rejected and currently appealed)
12. (rejected and currently appealed)
13. (rejected and currently appealed)
14. (rejected and currently appealed)
15. (rejected and currently appealed)
16. (rejected and currently appealed)
17. (rejected and currently appealed)
18. (rejected and currently appealed)
19. (rejected and currently appealed)
20. (rejected and currently appealed)
21. (rejected and currently appealed)
22. (rejected and currently appealed)
23. (rejected and currently appealed)
24. (rejected and currently appealed)
25. (rejected and currently appealed)
26. (rejected and currently appealed)
27. (rejected and currently appealed)
28. (rejected and currently appealed)
29. (rejected and currently appealed)

STATUS OF AMENDMENTS

There has been no amendment to the claims filed subsequent to final rejection.

SUMMARY OF CLAIMED SUBJECT MATTER

Applicants claim a novel method for the consumption of pizza. Specifically, applicants have discovered a convenient and innovative way to eat pizza one-handed, without spilling toppings or sauce. This invention is of extreme interest to the fast food industry, which has for years unsuccessfully attempted to market a pizza-to-go type product that captures the essence of eating pizza without leaving an embarrassing mess. Applicants describe the invention in 29 claims that are reproduced in the Claims Appendix attached to this brief. To ease citation, applicants refer to the pre-grant published application, U.S. Patent App. No. 2002/0090422 (Pub. Date Jul. 11, 2002), also appended. (Line numbers are not printed in the USPTO publication; references to the specification will be introduced by page and paragraph number.)

There are two main groups of claims in the application. The first group, which includes claims 1-13, is directed to pizza and pizza-type pies having a typical amount of toppings and sauce. Claims 14-29 involve pizza and pizza-type pies having less toppings and/or less sauce. Within each group of claims, there is a sub-group of four independent claims, for a total of eight independent claims in the whole application. Each sub-group of claims includes two method claims and two product-by-process claims. For convenience, the claims at issue will be discussed by group and sub-group.

Method Claims to a Pizza-Type Pie with Regular Toppings and Sauce

Independent claims 1 and 5 disclose a method for folding a pizza-type pie into a configuration such that toppings and sauce leakage are substantially minimized. As a general method, paragraph 7 on page 1 and paragraph 26 on page 2 of the specification describe the claimed folding method. Generally, the method includes (1) folding an end portion of the pizza slice in a transverse direction so that upon folding, the top of the end portion meets the top of the remainder of the slice, and then (2) folding the resulting slice in a lengthwise direction. This is further illustrated in Figures 1-3.

Claims 1 and 5 differ only in the shape of pizza involved. Claim 1, along with its dependent claims 2 through 4, apply to wedge-, substantially-round and substantially-square pizza pies. Claim 5, along with its dependent claims 6 and 7, apply to a wedge-

shaped slice of pizza-type pie. Both sub-groups of independent and dependent claims find ample support in the specification and drawings. Claims 1-4 are illustrated in Figures 1A through 1F. Specifically, Figure 1A shows a generic depiction of a wedge-shaped pizza slice as mentioned in dependent claim 2 and in independent claim 5. Likewise, Figure 2A illustrates a substantially-square pizza, and Figure 3A depicts a substantially-round pizza, as referred to in dependent claim 2. Figures 1B-1D, 2B-2D and 3B-3D further illustrate the folding method disclosed in independent claims 1 and 5. In the specification, paragraph 28 on pages 1-2 discusses the folding method disclosed in claims 5-7, which are directed to a wedge-shaped slice of pizza-type pie. Similarly, the claimed method is applied to a substantially-square slice of pizza in paragraphs 30-31 of page 3 of the specification. The substantially-round slice of pizza is discussed in paragraph 32 of page 3 of the specification.

Product-by-Process Claims to a Pizza-Type Pie with Regular Toppings and Sauce

As noted previously, each sub-group of claims includes two product-by-process claims. For the first group involving pizza-type pies with regular toppings and sauce, these include independent claims 8 and 11. Claim 8 is followed by dependent claims 9 and 10, while dependent claims 12 and 13 follow independent claim 11. Claim 8 and claim 11 differ in the shape of the slice of pizza involved. Whereas claim 8 describes a product formed by folding a wedge-, substantially-round or substantially-squared shaped pizza slice, claim 11 is directed to a product formed by folding a wedge-shaped slice of pizza.

The products formed by the process disclosed in claims 8-10 are depicted in Figures 1D, 2D and 3D. These pictures are described verbally in paragraphs 28-32 on pages 2-3 of the specification. Claims 11-13 are illustrated in Figure 1D, and further discussed in paragraphs 28-29 on pages 2 and 3 of the specification.

Method Claims to a Pizza-Type Pie with Less Toppings and Sauce

The second major group of claims, claims 14-29, are directed to methods and products formed by folding a pizza-type pie slice having less toppings and sauce. While

the purpose of the claimed invention is to minimize the likelihood of spillage while eating a regular pizza-on-the-go, the applicant also envisions specially designed pizza-type pies having end portions that are substantially free of toppings. (Spec., p. 1, para. 8-9, and p. 3, para. 33.) Such a specially designed pizza-type pie would permit better folding without straying from the typical look and feel of a pizza. Independent claims 14 and 19 disclose methods for folding a pizza-type pie having its end portion substantially free of toppings and sauce, whereas independent claims 22 and 27 describe the products resulting from application of the method.

Independent claim 14 leads dependent claims 15 and 16. Independent claim 19 is followed by dependent claims 20 and 21. Independent claim 14 and its dependents differ from independent claim 19 and its dependents by the shape of the pizza-type pie involved. Whereas claim 16 discloses a slice that can either be wedge-shaped, substantially-round or substantially square, claim 19 discusses a method for folding a wedge-shaped slice of pizza-type pie. Both sets of claims within this sub-group find ample support in the specification and in the drawings.

Figures 4A-4D, 5A-5D and 6A-6D illustrate the method found in claims 14-16. Specifically, Figures 4A-4C show application of the claimed method to a wedge-shaped pizza slice having an end portion substantially free of toppings, also described in paragraph 34 on page 3 of the specification. Figures 5A-5C show application of the claimed method to a substantially-square pizza slice having an end portion substantially free of toppings, also described in paragraph 34 of page 3 of the specification. Figures 6A-6C show application of the claimed method to a substantially-round pizza slice having an end portion substantially free of toppings, also described in paragraph 34 of page 3 of the specification. The topping-free end portions for each respective pizza shape are highlighted as tip portion 11 of Figure 4A, end portion 31 of Figure 5A, and end portion 51 of Figure 6A. (Spec., p. 3, para. 34.)

Claims 19-21, directed to the method of folding a wedge-shaped slice of pizza-type pie having an end portion substantially free of toppings, are also supported by paragraph 34 of page 3 of the specification, as well as Figures 4A-4C.

Product-by-Process Claims to a Pizza-Type Pie with Less Toppings and Sauce

Independent claims 22 and 27 are directed to a product formed by the process of folding a pizza-type pie first in a transverse, and then the lengthwise direction. Independent claim 22 is followed by its dependent claims 23-26, and dependent claims 28 and 29 follow independent claim 27. Claims 22-26 specify folding wedge-shaped, substantially-round or substantially-square pizza-type pies to form the claimed product, whereas claims 27-29 apply only to a wedge-shaped slice of pizza-type pie. All of claims 22-29 concern applying the described process to a pizza-type pie having an end portion that is substantially free of toppings and sauce, and all of these claims are fully supported by the specification and drawings.

The products formed by the process disclosed in claims 22-26 can be found in Figures 4A (wedge-shaped), 5A (substantially-square) and 6A (substantially-round). The product formed by the process disclosed in claims 27-29 is illustrated as Figure 4A (wedge-shaped). The end portions that are substantially free of toppings and sauce for each described shape are shown as tip portion 11 in Figure 4A, end portion 31 in Figure 5A and end portion 51 in Figure 6A. Tip portion 11 of Figure 4A is also referenced by claims 27-29. (See also spec., p. 3, para. 34.)

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-13 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the article “Pizza Inversion” by Brad Appleton.

Claims 14-29 were rejected under 35 U.S.C. § 103(a) as being unpatentable over the article on “Pizza Inversion” by Brad Appleton in view of the cookbook, *Cooking A to Z*.

ARGUMENT

Both groups of claims 1-13 and 14-29 were rejected as unpatentable on the basis of 35 U.S.C. § 103(a), which provides:

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

For claims 1-13, the Examiner posits that these claims are unpatentable solely over the article “Pizza Inversion” by Brad Appleton (“Appleton article”). Claims 14-29 are allegedly unpatentable over the combination of the article on “Pizza Inversion” by Brad Appleton and the cookbook, *Cooking A to Z* (“Cookbook”). Applicants believe that the claims are not obvious in light of the cited prior art references. There is no basis for modifying the Appleton article to combine two separate folds to obtain the two combined folds set forth in the claims. Moreover, with regard to claims 14-29, there is no motivation or suggestion to combine the cited prior art references, and even if one were to combine the references, the resultant product falls short of the claimed invention.

A. Claims 1-13 Are Patentable Over the Appleton Article, Because the Examiner Has Not Established a Prima Facie Case of Obviousness, and the Examiner’s Unsupported Obviousness Contention Has Been Rebutted by Evidence of Secondary Considerations.

Applicants begin by addressing the Appleton article with regards to pending claims 1-13. In Office Actions dated January 24, 2004, July 2, 2004, May 19, 2005, and February 8, 2006, the Examiner asserted that the Appleton article separately teaches (1) folding one half of a slice of pizza over the other half (“the half fold”) and (2) folding the pointed end of a slice of pizza towards the crust (“the end fold”). (Appleton, p. 4.) To illustrate, Applicants point to the figures below. Figure 1 from Appleton illustrates the half fold. Figure 4B (from applicants’ application) depicts the end fold that was described but not illustrated in the Appleton article. Figure 4C (from applicants’ application)

illustrates an embodiment of the claimed method. Although acknowledging the absence of any teaching or suggestion by the Appleton article to combine the two folds, i.e., folding the end portion and then folding one half over the other half, the Examiner asserts that it would have been obvious for the skilled artisan to apply the combined folds to obtain a closed pocket and prevent dripping of toppings and sauce. (See p. 4 of Jan. 29, 2004 Office Action, and p. 2 of May 19, 2005 Office Action).

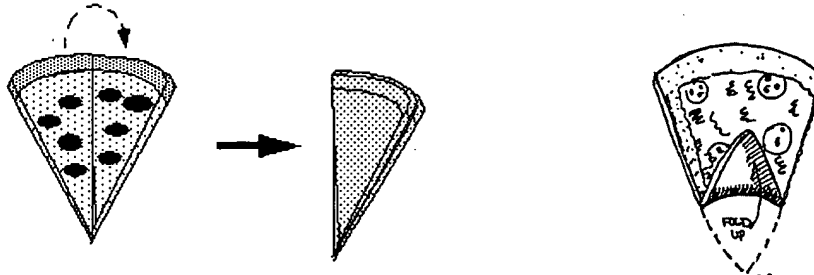


Figure 1 from Appleton

Figure 4B from Application

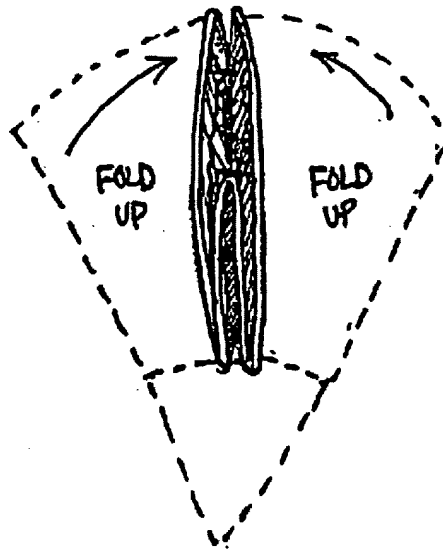


Figure 4C from Application

Applicants respectfully traverse this rejection. To establish a *prima facie* case of obviousness, three basic criteria must be met. First, there must be some suggestion or motivation, either in the references or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine references. Second, there must be a reasonable expectation of success. Lastly, the prior art reference, or references

combined, must teach or suggest all the claim limitations. MPEP § 2143. Furthermore, the references must be viewed without the benefit of impermissible hindsight vision afforded by the claimed invention. *See e.g.*, MPEP §2141 and *Hodosh v. Block Drug Co., Inc.*, 786 F.2d 1136, 1143 n.5 (Fed. Cir. 1986). “The reason, suggestion, or motivation to combine [prior art references] may be found explicitly or implicitly: (1) in the prior art references themselves; (2) in the knowledge of those of ordinary skill in the art that certain references, or disclosures in those references, are of special interest or importance in the field; or (3) from the nature of the problem to be solved, ‘leading inventors to look to references relating to possible solutions to that problem.’” *Ruiz v. A.B. Chance Co.*, 234 F.3d 654, 665 (Fed. Cir. 2000) (quoting *Pro-Mold & Tool Co. v. Great Lakes Plastics, Inc.*, 75 F.3d 1568, 1572 (Fed. Cir. 1996).

First, as the Examiner acknowledged, the Appleton article fails to teach or suggest the combination of the end fold and the half fold. (See p. 4 of Jan. 29, 2004 Office Action, and p. 2 of May 19, 2005 Office Action). The Federal Circuit has held that a cited prior art does not teach an applicant’s invention if it states objectives that may be interpreted as contrary to the disclosed purpose of an applicant’s invention. *See WMS Gaming Inc. v. International Game Tech.*, 184 F.3d 1339 (Fed. Cir. 1999). Here, the purpose of the Appleton article fails to teach the applicants’ claimed invention because Appleton’s “Pizza Inversion” disclosure sought to solve a different problem. Indeed, Appleton’s stated objectives reinforce this interpretation (found in the section entitled “Applicability”):

Use Pizza Inversion when:

you have multiple slices of hot, tasty pizza that you wish to consume;

you want to eat the pizza quickly and cleanly, without burning the roof of your mouth; and

you are in a very informal social setting.

Conversely, applicants present a folding method that allows pizza to be eaten neatly with one hand and minimizes spillage of the toppings and sauce. (See p. 1, ¶ 0006 of Applicants’ published application, Pub. No. 2002/0090422.). Applicants’ claimed purpose does not equate with Appleton’s claimed purpose: to consume pizza slices

quickly, while still hot, without burning a person's mouth. (See the section entitled "Intent.") The Appleton article was written by a pizza enthusiast as a comic attempt to equate software development principles to eating pizza. It merely shows that it was known to eat pizza using either the half fold or the end fold. Accordingly, not only does the Appleton article fail to recognize the applicants' problem to be solved, but it also fails to provide any explicit or implicit motivation or suggestion to combine the two folds on a single slice. Absent recognition of the problems, the Appleton article cannot be offered as proof that the solution was known or would have been obvious from Appleton's two distinct folds. For at least this reason, claims 1-13 are patentable.

Second, Applicants respectfully submit that the Examiner never met her burden to show that a skilled artisan would have had the knowledge or the motivation to modify the Appleton article to combine the two separate folds. The Federal Circuit has consistently held that a person of ordinary skill in the art must not only have had some motivation to combine the prior art teachings, but some motivation to combine the prior art teachings in the particular manner claimed. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1371 (Fed. Cir. 2000) ("Particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed." (emphasis added)); *In re Rouffet*, 149 F.3d 1350, 1357 (Fed. Cir. 1998) ("In other words, the examiner must show reasons that the skilled artisan, confronted with the same problems as the inventor and with no knowledge of the claimed invention, would select the elements from the cited prior art references for combination in the manner claimed." (emphasis added)). The Examiner did not present any evidence of the use of the combined folds for a pizza slice that is at least partially baked. Indeed, the major pizza companies in the industry have failed to teach or suggest the combined folds for a pizza slice, despite the unmet need of selling pizza configured to be eaten neatly with one hand. If Appleton is accepted as one skilled in the art, and the applicants are not conceding that he is, then even in the 11 years following the Internet publication of his article, he has not, nor has anyone else conceived to apply the combined half and end folds to a pizza slice. Not only is the combination of the two folds counter-intuitive, the skilled artisan would expect the traditionally flat pizza slice to be thickened and stiffened by one fold and to resist a second fold. The Examiner's failure to

In response to the obviousness rejections in the Office Action dated July 2, 2004, applicants submitted the Declaration of Mark J. Halperin (“Halperin Decl.”) pursuant to 37 C.F.R. § 1.132. This declaration specifically and thoroughly contravenes the Examiner’s contention that the combination of separate folds allegedly suggested in the Appleton article is obvious to one skilled in the art.

To describe Mr. Halperin’s qualifications as one skilled in the art, applicants disclosed that Mr. Halperin is an expert in the culinary arts in view of his impressive formal credentials, training, and experience. After obtaining an undergraduate from Reed College and a graduate degree from Boston University, Mr. Halperin was formally trained as a chef at École de Cuisine La Varenne in Paris, where he was awarded a Grand Diplôme d’Etudes Culinaires in 1979. (Halperin Decl., ¶ 3.) Mr. Halperin’s practical experience as a professional chef and instructor is equally impressive. (See Halperin Decl. ¶ 4.) In each of his professional positions, Mr. Halperin had considerable experience baking and teaching others to bake foods involving dough. (*Id.*) Furthermore, Mr. Halperin also has significant additional experience in the baking of dough, as a consultant for the Croissant Show (New York, New York) and for Bon Appétit Bakeries (Denver, Colorado,). (*Id.*)

Since 1992, Mr. Halperin has been the Culinary Director at the Center for Culinary Development (“the Center”) in San Francisco, California, a privately-owned consulting business. Mr. Halperin co-founded the Center and is currently a principal. (Halperin Decl., ¶ 2.) As Culinary Director, Mr. Halperin relies on his formal training and experience to provide consulting services in restaurant concept development, menu development, and new food and beverage product development for the retail consumer market as well as for restaurant and food service environments. (*Id.*) Mr. Halperin has helped develop packaged foods, including pizza, as well as menu items for “fast food” restaurants. (*Id.*) Several of these products have been successfully commercialized on a national scale. (*Id.*)

As part of his work at the Center, Mr. Halperin also keeps informed of new trends, techniques and developments in the culinary arts by actively participating in professional groups and publications. (Halperin Decl., ¶ 5.) Of the new trends, Mr. Halperin has been particularly interested in the developing market for food “on the go”

support her contention with a viable rationale defeats a rejection based on obviousness, and renders claims 1-14 patentable.

Without any motivation or desirability to combine the separately disclosed half fold and the end fold in the Appleton article, the Examiner used impermissible hindsight vision afforded by the claimed invention. The Federal Circuit has clearly defined the rationale against applying impermissible hindsight. “Our case law makes clear that the best defense against the subtle but powerful attraction of a hindsight-based obviousness analysis is rigorous application of the requirement for a showing of the teaching or motivation to combine prior art references.” *In re Dembiczak*, 175 F.3d 994, 999 (Fed. Cir. 1999); *see also Ruiz*, 234 F.3d at 665 (explaining that the temptation to engage in impermissible hindsight is especially strong with seemingly simple mechanical inventions). This is because “[c]ombining prior art references without evidence of such a suggestion, teaching, or motivation simply takes the inventor’s disclosure as a blueprint for piecing together the prior art to defeat patentability—the essence of hindsight.” *Dembiczak*, 175 F.3d at 999. Here, applicants have made a sufficient showing that there is no evidence that one skilled in the art would be suggested to, taught by or motivated by the Appleton article to create the present invention, and that the Examiner has therefore applied impermissible hindsight. The fact that aspects of the claimed invention were individually known in the art is not sufficient to establish a *prima facie* case of obviousness without some objective reason to combine the teachings of the references. *See e.g.*, MPEP 2143.01, especially the subsection entitled, “Fact that the Claimed Invention is within the Capabilities of One of Ordinary Skill in the Art is Not Sufficient by Itself to Establish Prima Facie Obviousness.” As emphasized above, there is not motivation or suggestion to modify the Appleton article to accomplish applicants’ claimed invention, and Appleton fails to teach the applicants’ claimed invention. Applicants, therefore, respectfully submit that this Section 103(a) rejection of claims 1-13 has been overcome.

B. The Halperin Declaration Rebutts the Examiner’s Unsupported Contention That the Combination of the Two Folds in the Appleton Article Would Have Been Obvious; Therefore, Claims 1-13 Are Patentable.

rather than at a table. (Halperin Decl., ¶ 6.) Mr. Halperin writes for two leading publications in the food industry, *QSR Magazine* (for the quick serve restaurant industry) and *Food Processing/Food Creation* (for the manufacturing industry). (Halperin Decl., ¶ 5.) Furthermore, Mr. Halperin manages the Center's Chef's Council, which consults with approximately eighty prominent chefs from across the United States to study trends in the food industry. (*Id.*) Mr. Halperin is also a member or has been a former member of various prestigious culinary organizations. (*See* Halperin Decl., ¶ 5.)

Applicants offer the declarative testimony of Mr. Halperin as representative as one skilled in the art. With all of his formal training, experience, and knowledge of new trends in the culinary arts, Mr. Halperin opines that the combination of the two folds for a slice of pizza (that is at least partially baked) is new and innovative. (Halperin Decl., ¶ 8.) To Mr. Halperin, this method of folding pizza provides an elegant way to meet the need for "on the go" pizza while preserving the benefits of the traditional pizza slice. (*Id.*) The combination of the two folds was new and not obvious to Mr. Halperin, because he "did not expect the combination of the two folds to produce a satisfactory result." (Halperin Decl. ¶ 9.)

Furthermore, Mr. Halperin is not aware of anyone utilizing the combination of the folds and, more importantly, is not aware of any successful attempts in the art to configure a traditionally backed pizza so that it can be eaten while not seated at a table without spillage of the cheese, sauce and toppings. (*Id.*) Mr. Halperin, therefore, concludes that the combination of the two folds has a significant potential to be the basis of a successful entrant in the "on the go" markets for pizza. (*Id.*) In fact, Mr. Halperin was so impressed by the claimed method of folding pizza that he favorably referenced the folding method in an October 2003 article titled "Humble inspirations, impressive destinations" for *Food Processing Magazine*. (Halperin Decl., ¶¶ 11 and 12, and Exhibit B, at p. 2, last paragraph.)

In view of these opinions of one skilled in the relevant culinary arts, applicants respectfully submit that they have successfully rebutted the Examiner's unsupported contention that the combination of the two folds would have been obvious. Applicants, therefore, respectfully submit that Section 103(a) rejection of claims 1-13 has been overcome.

C. Claims 14-29 Are Patentable Over the Appleton Article In View of the Cookbook, Because the Examiner Did Not Establish a Prima Facie Case of Obviousness and the Examiner's Unsupported Obviousness Contention Is Rebutted By the Halperin Declaration.

Claims 14-29 have been rejected under 35 U.S.C. § 103(a) as unpatentable over the Appleton article in view of p. 447 of the cookbook titled "Cooking A to Z" ("the Cookbook"). The Examiner points to the Appleton article for separately teaching (1) folding one half of a slice of pizza over the other half and (2) folding the pointed end of a slice of pizza towards the crust. (Appleton article, p. 4.) The Examiner points to page 447 of the Cookbook as showing a pizza slice having one end substantially free of toppings. (See Office Actions dated January 24, 2004, July 2, 2004, May 19, 2005, and February 8, 2006.) Although acknowledging the absence of any teaching or suggestion by the Appleton article to combine the two separate folds, e.g., folding the end portion and then folding one half over the other half, the Examiner asserts that it would have been obvious for the skilled artisan to apply the combined folds to obtain a closed pocket and prevent dripping of toppings and sauce. (See p. 4 of Jan. 29, 2004 Office Action, and p. 2 of May 19, 2005 Office Action.) The Examiner further asserts that it would have been obvious to make a pizza without any toppings at one end as purportedly as shown in p. 447 of the Cookbook, because pizza is a very versatile food product.

Applicants respectfully traverse this rejection for the following reasons, as discussed in more detail below: (i) the Examiner did not establish a prima facie case of obviousness; and (ii) the Halperin Declaration rebuts the examiner's unsupported obviousness contention.

- 1. The Examiner has not established a prima facie case of obviousness of claims 19-29 based only on Appleton article and the Cookbook, because the combination fails to teach or suggest applying the combination of the Half Fold and the End Fold to a slice of pizza having an end portion that is substantially free of toppings.**

Applicants respectfully reiterate that the Examiner did not establish a prima facie case of obviousness of claims 14-29. Applicants incorporate by reference herein their arguments presented above in relation to the deficiencies of the Appleton article. In their

amendment filed on April 23, 2004, in response to the January 29, 2004, Office Action, Applicants presented the following summarized arguments:

(1) Page 447 of the Cookbook does not even address, much less resolve, the deficiencies in the Appleton article;

(2) Page 447 of the Cookbook seems to show a whole pizza with at least one topping, i.e., cheese, throughout the entire surface of the pizza. The slice of the pizza on p. 447 of the Cookbook, therefore, is not substantially free of toppings. (*See e.g.*, p. 6, lines 8-12 of the Applicants' specification, which includes cheese as a topping.)

Furthermore, a close inspection of the pizza shown at p. 447 of the Cookbook shows a vegetable topping in the center of the pizza. Accordingly, a slice of the pizza would have some of the vegetable topping on the end portion. Applicants, therefore, respectfully submit that the Examiner failed to establish a prima facie case of obviousness of claims 14-29 in the combination of the Appleton article (which provides no teach or suggestion of an end portion substantially free of toppings) and p. 447 of the Cookbook (which shows a topping on the end portion). Claims 14-29 should be deemed patentable over this combination.

2. The Halperin Declaration rebuts the Examiner's unsupported contention that it would have been obvious to omit the cheese from one area of a pizza.

In the July 2, 2004, Office Action, the Examiner asserted without support the following:

While the pizza has cheese throughout the surface, the cookbook does show that the other toppings are limited to [a] certain area. What the cookbook suggest[s] is the versatility in making pizza. For example, it would have been obvious to omit the cheese in one area if one wants to reduce the fat content and calorie of the pizza.

(July 2, 2004 Office Action, p. 3.) Applicants believe, as they stated in their prior filed response, that at least paragraph 10 of the Halperin Declaration addresses this issue. As discussed above, Mr. Halperin is an expert in the culinary arts and one skilled in the relevant art. Despite his formal training, experience, and knowledge of new trends in the

culinary arts, Mr. Halperin states that it was not obvious to him to create a pizza with portions free of cheese and topping if cheese and toppings are elsewhere on the pizza. (Halperin Decl., ¶ 10.) In fact, Mr. Halperin opines that the consumer would not accept a pizza with cheese and toppings missing from a significant area, absent folding the pizza slice according to the present invention. (*Id.*) Although pizza can be configured to have different combinations of toppings in different sections, Mr. Halperin confirms that such pizzas would have the same toppings consistently throughout any particular section. (*Id.*) In his own words, Mr. Halperin emphasizes:

To the contrary, the consumer probably would not accept a pizza with cheese and toppings missing from a significant area, absent folding. Moreover, although pizza can be configured to have different combinations of toppings . . . in different sections of the pizza . . . such pizzas would have the same toppings consistently throughout any particular section. The purpose of such combination pizzas, after all, is to allow consumers with differing preferences to order pizza having different combinations of toppings, where a slice has the desired combination of toppings consistently from center to crust.

As further support for applicants' contentions, applicants refer to paragraph 9 of the Halperin Declaration, wherein he states:

Further, I did not expect the combination of the two folds to provide a satisfactory result . . . No one to my knowledge has previously developed a successful way to confer traditionally baked pizza so that it can be eaten while not seated at a table without spillage of the cheese, sauce and toppings. In addition, no one to my knowledge has tried to commercialize a pizza folded in the manner depicted in the Drawings.

These are all facts and evidence to show why it is not obvious to combine the two folds or eliminate toppings from a portion of slice of pizza. For example, Mr. Halperin did not have a reasonable expectation of success in applying both folds to a traditional slice of pizza. Furthermore, in view of Mr. Halperin's vast experience and knowledge in the food industry, the fact that he is not aware of anyone using or commercializing the claimed method is a fact in itself.

In view of these opinions from an expert in the culinary arts, applicants respectfully submit they have successfully rebutted the Examiner's unsupported contention that it would have been obvious to omit cheese and toppings in one area of a pizza slice. Applicants, therefore, respectfully request withdrawal of this Section 103(a) rejection of claims 14-29.

CLAIMS APPENDIX

The following is a clean copy of the claims involved in the appeal.

1. A method of configuring a slice of a pizza-type pie, which is at least partially baked, the method comprising:
folding an end portion of the slice in a transverse direction; and
folding the slice in a lengthwise direction.
2. The method of claim 1, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.
3. The method of claim 2, wherein the folded end portion is from about 10% to about 40% of the length of the slice.
4. The method of claim 3, wherein the folded end portion is from about 20% to about 35% of the length of the slice.
5. A method of configuring a wedge-shaped slice of a pizza-type pie, which is at least partially baked, the method comprising:
folding a pointed end portion of the slice in a transverse direction; and
folding the slice in a lengthwise direction.
6. The method of claim 5, wherein the folded end portion is from about 10% to about 40% of the length of the slice.
7. The method of claim 6, wherein the folded end portion is from about 20% to about 35% of the length of the slice.
8. A configuration of a slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:

folding an end portion of the slice in a transverse direction; and
folding the slice in a lengthwise direction.

9. The product of claim 8, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.

10. The product of claim 9, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

11. A configuration of a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:
folding a pointed end portion of the slice in a transverse direction; and
folding the slice in a lengthwise direction.

12. The product of claim 11, wherein the folded end portion ~~that~~ is from about 10% to about 40% of the length of the slice.

13. The product of claim 12, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

14. A method of configuring a slice of a pizza-type pie, which is at least partially baked, which method comprises:
folding an end portion of the slice in a transverse direction, wherein the end portion is substantially free of toppings and wherein the remainder of the slice has one or more toppings; and
folding the slice in a lengthwise direction.

15. The method of claim 16, wherein the folded end portion of the slice is further substantially free of sauce.

16. The method of claim 14, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.

17. The method of claim 16, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

18. The method of claim 17, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

19. A method of configuring a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which method comprises:

folding a pointed end portion of the slice in a transverse direction, wherein the end portion is substantially free of toppings and wherein the remainder of the slice has one or more toppings; and

folding the slice in a lengthwise direction.

20. The method of claim 19, wherein the folded end portion of the slice is further substantially free of sauce.

21. The method of claim 19, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

22. A configuration of a slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:

folding an end portion of the slice in a transverse direction, wherein the end portion is substantially free of toppings and wherein the remainder of the slice has one or more toppings; and

folding the slice in a lengthwise direction.

23. The product of claim 22, wherein the folded end portion of the slice is further substantially free of sauce.
24. The product of claim 22, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.
25. The product of claim 24, wherein the folded end portion is from about 10% to about 40% of the length of the slice.
26. The product of claim 25, wherein the folded end portion is from about 20% to about 35% of the length of the slice.
27. A configuration of a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:
folding a pointed end portion of the slice in a transverse direction, wherein the end portion is substantially free of toppings and wherein the remainder of the slice, has one or more toppings; and
folding the slice in a lengthwise direction.
28. The product of claim 27, wherein the folded end portion of the slice is further substantially free of sauce.
29. The product of claim 27, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

The following is a copy of the claims involved in the appeal, as they were filed in response to Examiner's January 29, 2004, office action.

1. (currently amended): A method of configuring a slice of a pizza-type pie, which is at least partially baked, the method comprising:

folding an end portion of the slice in a transverse direction ~~so that upon folding the top of the end portion is folded onto the top of the remainder of the slice~~; and

folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself~~.

2. (original): The method of claim 1, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.

3. (currently amended): The method of claim 2, wherein the folded end portion ~~that~~ is from about 10% to about 40% of the length of the slice.

4. (original): The method of claim 3, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

5. (currently amended): A method of configuring a wedge-shaped slice of a pizza-type pie, which is at least partially baked, the method comprising:

folding a pointed end portion of the slice in a transverse direction ~~so that upon folding the top of the end portion is folded onto the top of the remainder of the slice~~; and

folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself~~.

6. (currently amended): The method of claim 5, wherein the folded end portion ~~that~~ is from about 10% to about 40% of the length of the slice.

7. (original): The method of claim 6, wherein the folded end portion is from about 20% to about 35% of the length of the slice.
8. (currently amended): A configuration of a slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:
folding an end portion of the slice in a transverse direction ~~so that upon folding the top of the end portion is folded onto the top of the remainder of the slice;~~ and
folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself.~~
9. (original): The product of claim 8, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.
10. (original): The product of claim 9, wherein the folded end portion is from about 10% to about 40% of the length of the slice.
11. (currently amended): A configuration of a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:
folding a pointed end portion of the slice in a transverse direction ~~so that upon folding the top of the end portion is folded onto the top of the remainder of the slice;~~ and
folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself.~~
12. (currently amended): The product of claim 11, wherein the folded end portion ~~that~~ is from about 10% to about 40% of the length of the slice.
13. (original): The product of claim 12, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

14. (currently amended): A method of configuring a slice of a pizza-type pie, which is at least partially baked, which method comprises:

folding an end portion of the slice, ~~which end portion is substantially free of toppings;~~ in a transverse direction, wherein the end portion is substantially free of toppings and wherein ~~so that the top of the end portion is folded onto the top of the remainder of the slice, which remainder~~ has one or more toppings; and

folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself.~~

15. (original): The method of claim 16, wherein the folded end portion of the slice is further substantially free of sauce.

16. (original): The method of claim 14, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.

17. (original): The method of claim 16, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

18. (original): The method of claim 17, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

19. (currently amended): A method of configuring a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which method comprises:

folding a pointed end portion of the slice, ~~which end portion is substantially free of toppings;~~ in a transverse direction, wherein the end portion is substantially free of toppings and wherein ~~so that the top of the end portion is folded onto the top of the remainder of the slice, which remainder~~ has one or more toppings; and

folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself.~~

20. (original): The method of claim 19, wherein the folded end portion of the slice is further substantially free of sauce.

21. (original): The method of claim 19, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

22. (currently amended): A configuration of a slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:

folding an end portion of the slice, ~~which end portion is substantially free of toppings,~~ in a transverse direction, wherein the end portion is substantially free of toppings and wherein so that the top of the end portion is folded onto the top of the remainder of the slice, which remainder has one or more toppings; and

folding the resulting slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself.~~

23. (original): The product of claim 22, wherein the folded end portion of the slice is further substantially free of sauce.

24. (original): The product of claim 22, wherein the slice is in a shape that is selected from the group consisting of a wedge shape, a substantially round shape, and a substantially square shape.

25. (original): The product of claim 24, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

26. (original): The product of claim 25, wherein the folded end portion is from about 20% to about 35% of the length of the slice.

27. (currently amended): A configuration of a wedge-shaped slice of a pizza-type pie, which is at least partially baked, which slice is obtained from the method comprising:

folding a pointed end portion of the slice, ~~which end portion is substantially free of toppings~~, in a transverse direction, wherein the end portion is substantially free of toppings and wherein so that the top of the end portion is folded onto the top of the remainder of the slice, which remainder has one or more toppings; and

folding the ~~resulting~~ slice in a lengthwise direction ~~so that the top of the resulting slice is folded onto itself~~.

28. (original): The product of claim 27, wherein the folded end portion of the slice is further substantially free of sauce.

29. (original): The product of claim 27, wherein the folded end portion is from about 10% to about 40% of the length of the slice.

EVIDENCE APPENDIX

Applicants enclose herewith a copy of the Declaration of Mark J. Halperin pursuant to 37 C.F.R. § 1.132, entered by the Examiner on December 6, 2004, and considered by the Examiner in her May 19, 2005, Office Action. The Examiner makes reference to this declaration on page 5 of the May 19, 2005, Office Action. The enclosed copy bears the mark of the OIPE dated December 6, 2004, as obtained by Applicants through PAIR. The enclosed declaration is accompanied by supporting documents submitted by the declarant.

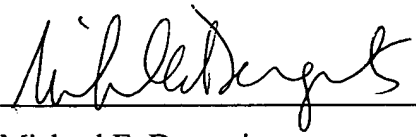
RELATED PROCEEDINGS APPENDIX

None.

For the reasons advanced above, it is respectfully asserted that the final rejection rendered by the Examiner in the present application of claims 1-29 was applied in error and, thus, the final rejection should be reversed.

Respectfully submitted,
DERGOSITS & NOAH LLP

Dated: October 30, 2006

By: 
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